



POLICE DEPARTMENT

December 7, 2018

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In the Matter of the Charges and Specifications :

- against - :

Sergeant Christopher Crain :

Tax Registry No. 933719 :

44th Precinct :

Case No.

2016-16618

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At:

Police Headquarters
One Police Plaza
New York, New York 10038

Before:

Honorable Paul M. Gamble
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB:

Jeannie Elie, Esq.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, New York 10007

For the Respondent:

John D'Alessandro, Esq.
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399 Knollwood Road
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To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

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CHARGES AND SPECIFICATIONS

1. Sergeant Christopher Crain (while in the rank of Police Officer), on or about June 23, 2016, at approximately 1315 hours, while assigned to the 40th Precinct and on duty, inside of [REDACTED], Bronx County, wrongfully used force, in that he punched Person A about the face without police necessity.

P.G. 221-02, Page 2, Paragraph 11 - USE OF FORCE

P.G. 221-01 - FORCE GUIDELINES

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on October 16, 2018. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. The CCRB offered the hearsay statement of Person A. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having reviewed all of the evidence in this case, I find that CCRB has failed to meet its burden of proof by a preponderance of the credible, relevant evidence. I therefore find Respondent Not Guilty of the charged misconduct.

ANALYSIS

The following is a summary of the facts which are not in dispute. On June 23, 2016, Respondent was assigned to anti-crime duties in the 40th Precinct (T. 14). At about 1640 hours, Respondent observed Person A near 137th Street and Willis Avenue, walking in the company of two other males (*Id.*). Respondent stepped from his vehicle and called out to Person A to stop; Person A began to run away and Respondent pursued him, eventually ending up on the sixth floor of [REDACTED] (T. 15). Respondent was in plain clothes (T. 22).

On the sixth floor, a confrontation ensued, some facts of which are in dispute. During the confrontation, Respondent grabbed Person A by his right wrist and punched him, causing him to fall to the ground. Person A was handcuffed and brought to a stairwell to wait for the other members of Respondent's team to arrive. As a result of being punched, Person A suffered

injuries to the left side of his mouth, which caused him to bleed onto the floor and onto Respondent's shirt (T. 27; CCRB Exhibits 2, 2A, 2B, 2C, 2F, 3).

Once members from Respondent's team met him on the sixth floor, Person A was led from the building and taken to an ambulance, which transported him to Lincoln Hospital. Person A was treated, then released to Respondent for arrest processing (CCRB Exhibits 1, 4 at 49). Person A was released from the 40th Precinct and eventually appeared in court. The charges filed against Person A were still pending as of the date of his CCRB interview on June 30, 2016.

At issue in this case is whether Respondent's punch constituted unnecessary force. The following is a summary of the evidence at trial.

Respondent testified that when he first observed Person A, he and his team were driving on Willis Avenue (T. 14). After Respondent saw Person A smoking marijuana on the sidewalk with two other males at 137th Street and Willis Avenue, his police vehicle made a U-turn on Willis Avenue (T. 14, 28). As he approached Person A and his companions, they were walking on Willis Avenue toward Brown Street (*Id.*). Respondent's team pulled up next to the group and he said, "Guys, Police Department, hang on a second" (T. 15). Person A's two companions stopped, but Person A kept walking (*Id.*). Respondent stepped from his police car and onto the sidewalk; at that point, Person A began running towards Brown Street (*Id.*). Respondent pursued Person A on foot while Police Officer Garcia drove their police vehicle as part of the pursuit (*Id.*). Person A doubled back during the pursuit and ran through a public housing development until he reached 175 Alexander Avenue, which he entered (*Id.*, 23).

Respondent pursued Person A into the building and entered a stairwell where he heard footsteps above him (*Id.*). As he ran up the stairs, Respondent heard a voice above him, which he described as belonging to an older male, say, "Slow down, youngster," to which Person A responded, "The cops chasing me, cops chasing me" (T. 15-16). The older male responded, "No

one's coming" (T. 16). As Respondent continued running up the stairs, he encountered the older man, who said, "Oh" (*Id.*). Respondent continued ascending the stairs until he heard a door close above him and surmised that Person A had exited the staircase on the sixth floor (*Id.*).

As Respondent arrived on the sixth floor, he observed Person A standing near a bank of elevators, bent over with his hands in his pants pockets, apparently trying to catch his breath (T. 16, 24). Respondent told Person A either, "Yo, show me your hands" or "Show me your fucking hands" (*Id.*, 24-25, 36). Person A stood up and removed both hands from his pockets (*Id.*). Respondent saw what he believed to be an unopened, black-handled gravity knife in Person A's right hand (*Id.*, 17, 33-34). Respondent and Person A were less than five feet from each other (T. 37, 39). Respondent noticed that Person A stood with his left foot forward and his right foot slightly behind him as he held the knife in his right hand (T. 40-41).

Respondent punched Person A once in his face, causing him to fall to the ground (*Id.*, 18, 25, 35). Respondent testified that he punched Person A because he was in such close proximity to him that he did not want to give Person A an opportunity to open the knife, which would almost certainly lead to him drawing his weapon (*Id.*, 42). Respondent handcuffed Person A and recovered a black-handled gravity knife from the floor where it had fallen (T. 17, 26).

Respondent asserted that he believed Person A was about to open the knife based upon the way he pulled it out of his pocket and held it in a downward position "where like he could flip it open and he could have possibly stabbed me with it" (T. 16-17). Respondent expressed the concern that "I was so close, I wanted to stop the threat before he opened it, I would possibly have to shoot him" (T. 18).

In his June 30, 2016, statement to CCRB, Person A claimed that Respondent came out of his police car and went straight toward him, while telling him to stop and "come here" (CCRB Ex. 4 at 3, 15, 22). Person A ran away, with Respondent in pursuit, until he reached "his

building”¹ (*Id.* at 4, 10, 22-23). Person A denied that he had been smoking marihuana at the time he encountered the police officers (*Id.* at 14). During the chase, Person A claimed Respondent was approximately one-half block behind him (*Id.* at 25).

While Person A was running up the stairs, he encountered a man descending the staircase who asked him why he was running; Person A responded, “A cop is chasing me” (*Id.* at 28-29). As Person A ran up the stairs, he became fatigued, so he stopped on the sixth floor to catch his breath (CCRB 4 at 4, 30). Person A claimed that approximately 10 seconds later, Respondent appeared on the sixth floor, grabbed his right arm, punched him in his face, and handcuffed him (*Id.* at 4, 29, 31, 33). Person A claimed further that once he had been handcuffed, Respondent punched him in his face again (*Id.* at 4, 34).

When questioned about how much time elapsed between Respondent grabbing his right arm and then punching him, Person A replied, “A minute or two” (*Id.* at 35). Following up on that response, Person A was asked whether Respondent grabbed his wrist and hit him immediately or there were two minutes in between.” Person A responded that he wasn’t sure (*Id.*). The investigator then asked the following question:

INVESTIGATOR: Okay. So just talking about the first hit, what, what – was it more or less like one motion, like grab your wrist and then the hit came like instantly?

Person A: It was like

INVESTIGATOR: Did anything happen in between?

Person A: No, it was like all at once.
(*Id.* at 36). Person A then estimated that it took Respondent 20 seconds to handcuff him; Respondent then supposedly punched him again 10 seconds after he was handcuffed (*Id.* at 37, 40).

¹ Person

While there is no dispute that the building in question in [REDACTED] Person A’s description is actually that of his [REDACTED]’s residence (CCRB Ex. 4 at 10).

Person A claimed that while he was at Lincoln Hospital being treated, a police officer told him that he had recovered a knife from an incinerator and accused Person A of owning it (*Id.* at 5). Person A denied having anything in his pockets but his keys, which he claimed to have lost while he was running, and \$40 in his left pocket (*Id.* at 21). Person A claimed further that the same officer told the medical staff at the hospital that the injury to Person A's lip occurred when he tripped running up the stairs (*Id.* at 6-7).

Few things are more difficult, yet more fundamental to the role of a trier of fact, than attempting to reconstruct past events on the basis of opposing accounts. In a hearsay case of this nature, particular attention must be paid to the evidence. This tribunal has held many times that while hearsay is admissible in administrative proceedings, and may be the sole basis for a finding of fact, it must be carefully evaluated before it is relied upon. The more important the evidence is to the case, the more critically it should be assessed (*Police Department v. Acosta*, OATH Index No. 464/00 [Jan. 7, 2000]). Factors such as corroboration, consistency, bias, logic and the degree to which an account comports with common sense and general human experience must be taken into account (*Maloney v. Suardy*, 202 A.D.2d 297, 609 N.Y.S.2d 179 [1st Dep't 1994]).

I credit Respondent's testimony as logical, forthright and candid. I credit Respondent's admission to the use of force as a factor in favor of his veracity. I find the portion of Respondent's testimony dealing with the surrounding circumstances leading up to, and including, his interaction with Person A to be credible based upon its plausibility and his demeanor before the Tribunal, which remained consistent, even when his testimony was challenged on cross-examination. While I am mindful that Respondent is an interested party in this proceeding, his testimony, when considered in the context of the entire record, was credible.

In contrast, I find Person A's hearsay statement lacked sufficient indicia of reliability to support a finding of guilt. At the core of Person A's denials of smoking marijuana and

possessing a gravity knife is the accusation that Respondent fabricated a pretext for chasing him and further fabricated a pretext for punching him. The record is devoid of credible evidence corroborating those out-of-court claims. Given the facially plausible testimony provided by Respondent, refutation of that testimony requires reliance upon evidence bearing significant indicia of reliability, which is absent from Person A's statement.

For example, in his out-of-court statement, Person A equivocated over whether Respondent struck him immediately after restraining his right hand or waited for up to "a minute or two" before striking him. It is only after Person A was asked a leading question that he eventually adopted the position that the blow was delivered simultaneously with Respondent grabbing his wrist. Similarly, his claim that Respondent recovered a knife from an incinerator and attempted to ascribe its possession him, a claim never explored during Respondent's cross-examination, is dubious. Finally, since Person A did not testify before the Tribunal, there was no opportunity to either clarify or refute the aforementioned assertions under oath. Based upon the foregoing, I find Person A's hearsay statement to be insufficiently reliable to support a finding of guilt.

Respondent is charged in the sole Specification with the wrongful use of force against Person A for punching him in his face. I find that CCRB has failed to meet its burden of proof by a preponderance of the credible, relevant evidence that Respondent employed the aforementioned use of force without police necessity.

Patrol Guide procedure 221-01 sets forth the following:

When appropriate and consistent with personal safety, members of the service will use de-escalation techniques to safely gain voluntary compliance from a subject to reduce or eliminate the necessity to use force. In situations in which this is not safe and/or appropriate, MOS will use only the reasonable force necessary to gain control or custody of a subject. The use of deadly physical force against a person can only be used to protect MOS and/or the public from imminent serious physical injury or death.

(P.G. 221-01).

Patrol Guide procedure 221-02 sets forth the following requirements for the use of force:

When a member of the service must gain compliance, control, or custody of an uncooperative subject, the member should comply with P.G. 221-01, "Force Guidelines", . . . (2) utilize de-escalation techniques when appropriate and consistent with personal safety, which may reduce or eliminate the need to use force, and increase the likelihood of gaining the subject's voluntary compliance and . . . (11) apply no more than the reasonable force necessary to gain control.

(P.G. 221-02).

While it is true that the Patrol Guide imposes a duty upon a police officer with the lawful authority to effect an arrest to consider de-escalation as a tactic, such consideration is fact-specific and dependent upon the attendant circumstances. In this case, CCRB has argued that Respondent's decision to punch Person A without giving him a directive to drop his knife violated the Patrol Guide's requirement that he consider de-escalation as a tactic. The Tribunal disagrees with this blanket assertion.

Under the circumstances presented in this case, I find that Respondent's decision to punch Person A was lawful and necessary. The credible evidence shows that Respondent's confrontation occurred in close quarters. It would have been unprofessional for Respondent to have issued a directive to drop the knife while remaining within the zone of Person A's reach should he elect to ignore the directive and open the knife. There was no dispute that the blade of a gravity knife could be extended in an instant. Moreover, Person A's possession of the gravity

knife from a position where he could use it to inflict serious bodily injury or death would constitute an imminent threat to Respondent which, under the Patrol Guide, could be met with deadly force.

Accordingly, a lawful response to the threat of the knife, consistent with Respondent's safety, would have been to draw his weapon before ordering Person A to drop it. Although this approach would place priority upon Respondent's personal well-being, it arguably would have made it more likely that deadly force would eventually be used. Patrol Guide procedure 221 02(1), however, also imposes a duty upon MOS to:

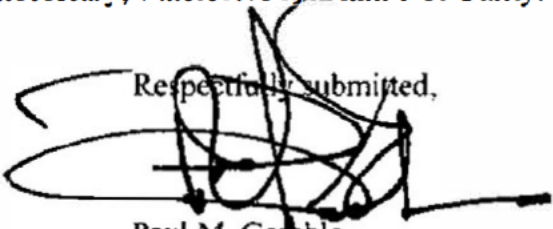
Take necessary action to protect life and personal safety of all persons present, *including suspects being taken into custody* (emphasis added).

(P.G. 221-01[1]).

Based upon the record before me, the evidence supports a finding that an unannounced punch to Person A's face, while clearly constituting a use of force, was an attempt to avoid employing a greater, and more likely than not lethal, use of force. Respondent's credible testimony made it clear that he struck Person A with the intent that Person A drop the knife before it could be opened, in order to avoid being forced to draw his weapon to meet the escalating threat.

I find that CCRB has failed to prove by a preponderance of the relevant, credible evidence that Respondent's use of force was unnecessary; I therefore find him Not Guilty.

Respectfully submitted,


Paul M. Gamble
Assistant Deputy Commissioner Trials

APPROVED


JAN 10 2019
JAMES P. O'NEILL
POLICE COMMISSIONER